

Appl. No. 10/787,266
Atty. Docket No. AA615M2
Reply dated May 30, 2008
Reply to Examiner's Response to Amendment dated April 30, 2008
Customer No. 27752

REMARKS

Claim Status

Claims 1-9 and 11-15 are pending in the present application. No additional claims fee is believed to be due.

Claims 9-10 are cancelled without prejudice.

Claim 1 has been amended to more specifically claim the present invention. Support for the amendment may be found on page 4, lines 20-32.

Rejection Under 35 USC §103(a) Over US 5,075,026 (Loth)

Claims 1-2, 4, 6-9, and 11-15 have been rejected under 35 USC §103(a) as being unpatentable over Loth. This rejection is traversed as Loth does not establish a *prima facie* case of obviousness because it does not teach or suggest all of the claim limitations of Claims 1-2, 4, 6-9, and 11-15. Therefore, the claimed invention is unobvious and that the rejection should be withdrawn.

Applicants note that a bulk of their previous arguments have not been addressed by the Office Action regarding the impropriety of using Loth as a reference under §103 if the pump-type sprayer if Loth is not sufficiently described so as to determine the structure or function of the sprayer. The Office Action merely states that the pump-type sprayers in the Ortiz Declaration, “* * * are not identified or specifically disclosed in Loth to make a meaningful side-by-side comparison.” This is entirely Applicants point – Loth itself does not say more than “pump-type sprayer” and Applicants have submitted Dr. Ortiz’s Declaration – as one skilled in the art – as to the meaning of “pump-type sprayer”. The Office Action has not addressed the Ortiz Declaration in any way other than with unsupported conclusory statements.

As such, Applicants have re-stated previously submitted arguments/discussion to the previously submitted rejections submitted in the February 20, 2007, office action that were reproduced essentially verbatim in the September 18, 2007, Office Action.

Specifically, Applicants would like to draw attention to the statement in the Office Action dated June 13, 2006, discussing Loth:

“It would have been obvious to one of ordinary skill in the art at the

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time the invention was made to have employed a dispenser, i.e., pump-type sprayer wherein the foam generated in the dispenser would exhibit a foam having a foam to weight ratio within those recited because similar ingredients with overlapping viscosity and similar dispenser have been used."

As discussed in the June 13, 2006, Dr. Rafael Ortiz Declaration ("Ortiz Declaration"), one of skill in the art would not equate a pump-type dispenser discussed in Loth with the foam-generating dispenser required by the present claims. Rather, a pump-type dispenser would be equated to a trigger type sprayer.

The Office Action of February 20, 2007, denies that Loth et al. describes a "pump-type sprayer" in a meaningful way. The Office Action of February 20, 2007, further addresses the Ortiz Declaration by stating that "none of these sprayers are identified or specifically disclosed in Loth to make a meaningful side-by-side comparison." Page 3. Applicants submit that it cannot be obvious to use the pump-type sprayer of Loth as a foam-generating dispenser if the pump-type sprayer of Loth is not sufficiently described so as to determine the structure or function of the sprayer. Without an enabling disclosure, the reference is not available as prior art. MPEP § 2121.01. Merely naming or describing the subject matter is insufficient if it cannot be produced without undue experimentation. *Elan Pharm., Inc. v. Mayo Found. For Med. Educ. & Research*, 346 F.3d 1051, 1054, 68 U.S.P.Q.2d 1373, 1376 (Fed. Cir. 2003).

The Office Action of February 20, 2007 only makes sense if the claims are read to require a pump-type sprayer rather than a foam-generating dispenser. Otherwise, the Office Action of June 13, 2006 provides that 1) the claim limitations directed to foam density are not disclosed in Loth et al.; and the Office Action of February 20, 2007 provides that 2) Loth et al. does not provide sufficient detail about the disclosed pump-type sprayer to infer a specific structure or function.

In effect, the Office Action of February 20, 2007 reads limitations out of the claims, replacing them with terms found in the references cited. This is not a simple case of rewording the claim limitation, but one of recharacterizing or even ignoring a claim limitation in order to apply vague references to an allegedly similar structure. This is impermissible. "To establish *prima facie* obviousness of a claimed invention, all the

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claim limitations must be taught or suggested by the prior art." MPEP § 2143.03. See also *In re Kahn*, 441 F.3d 977, 986, 78 U.S.P.Q.2d 1329, 1335 (Fed. Cir. 2006) (identification of each claim element in the prior art is necessary, but not sufficient, to defeat patentability).

Applicants note that the Ortiz Declaration makes reference to exemplified formulations. Although not discussed in the Office Action of February 20, 2007, Applicants have realized that while the copending application 10/787,343 included such examples, the present specification did not include such examples. Applications have amended the specification (above) to now include the referenced examples of the Ortiz Declaration.

The Office Action of February 20, 2007, also argues that the Ortiz Declaration is ineffective because "the showing is not commensurate in scope with the claims." Page 3. Applicants can find no authority for the requirement that a declaration, submitted to refute an unsupported allegation of similarity to a cited reference, provide data commensurate in scope with the claims.

The Office Action of February 20, 2007 further alleges that the Ortiz Declaration is flawed because it "did not specify which formulation was exactly used for the showing," and because "it is not clear whether the same formulation is used for the tests" reported. Pages 3 – 4. As demonstrated below, these objections are overwrought.

Applicants submit that the Ortiz Declaration was intended to refute the allegation of the Office Action that "similar" compositions in "similar" dispensers would yield the claimed foam-to-weight ratio. See Applicant's Remarks submitted November 13, 2006 at Page 5 ("In the event one of skill in the art would equate a pump-type sprayer with a foam-generating dispenser, as shown by the testing data presented in Dr. Ortiz's declaration, the foam to weight ratio is not within the limits in the present claims."). Therefore the Ortiz Declaration is not subject to the requirement that declarations to establish surprising results must provide data commensurate in scope with the claims.

The Office Action of February 20, 2007 alleges that the Ortiz Declaration is defunct because "Applicants allege that the compositions similar to those discussed in the present application . . . were used but did not specify which formulation was exactly

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used." Page 3. Further, the Office Action of February 20, 2007 states, "it is not clear whether the same formulation is used for the tests." Pages 3 – 4.

The descriptions of the test performed are adequate in light of the intended purpose of the declaration. The composition used was consistent with the exemplary embodiments described in the specification. Further, although Applicants regret any lack of clarity, the consistent use of singular forms and comparative terms strongly suggest that the same composition was used in generating data from each of the two dispensers tested. For example, the Ortiz Declaration explains that "the" composition, when used in a pump-type sprayer "versus" a foam-generating dispenser, "does not" generate the foam to weight ratio claimed in the present application. Ortiz Declaration at ¶5.

Applicants submit that the description of the test performed is adequate in light of the Office Action's vague assertions of "similar" dispensers. More detailed and more thorough testing would not be any more convincing in the absence of a more structured framework for the rejection. Stated another way, no amount of data will overcome the speculation that some kind of pump-type sprayer might satisfy the claim limitations.

"If rebuttal evidence of adequate weight is produced, the holding of *prima facie* obviousness, being but a legal inference from previously uncontradicted evidence, is dissipated. Regardless of whether the *prima facie* case could have been characterized as strong or weak, the examiner must consider all of the evidence anew." *In re Piasecki*, 745 F.2d 1468, 1472, 223 U.S.P.Q. 785, 788 (Fed. Cir. 1984). Even if the initially presented case for *prima facie* obviousness is taken as compelling, the production of evidence requires reassessment of "all the evidence and should not be influenced by any earlier conclusions." MPEP § 2144.08(III) (citing to *In re Piasecki*, 745 F.2d at 1472-73, 223 U.S.P.Q. at 788). "[T]he nature of the matter sought to be established, as well as the strength of the opposing evidence, must be taken into consideration in assessing the probative value of expert opinion." *In re Oelrich*, 579 F.2d 86, 91, 198 USPQ 210, 215 (CCPA 1978).

As described above, the alleged failings of the Ortiz Declaration are inapt or overstated. The Ortiz Declaration is therefore the only evidence of record as to the meaning of the disclosure of Loth et al. to one of skill in the art.

"If the examiner is relying on personal knowledge to support the finding of what

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is known in the art, the examiner must provide an affidavit or declaration setting forth specific factual statements and explanation to support the finding." MPEP § 2144.03C. See also 37 C.F.R. § 1.104(d)(2). "[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." KSR Int'l Co. v. Teleflex Inc., 550 U.S. ___, 14 (2007) (quoting In re Kahn, 442 F.3d at 988, 78 U.S.P.Q.2d at 1336 (Fed. Cir. 2006)).

As such, Applicants submit that Loth does not teach or suggest all of the claim limitations of Claims 1-2, 4, 6-9, and 11-15 and, therefore, does not establish a prima facie case of obviousness (see MPEP 2143.03). Applicants respectfully request that the rejection of Claims 1-2, 4, 6-9, and 11-15 under 35 U.S.C. § 103(a) over Loth be withdrawn.

Rejection Under 35 USC §103(a) Over US 5,075,026 (Loth) in view of US 6,114,298 (Petri et al.) and further view of US 5,635,469 (Fowler et al.)

Claims 1-2, 4-8, 11-15 are rejected under 35 U.S.C. § 103(a) over Loth in view of Petri et al.. Claim 3 is rejected under 35 U.S.C. § 103(a) over Loth in view of Petri et al. and Fowler et al.

Applicants refer to the discussion above regarding Loth.

Petri et al. is discusses a microemulsion suitable for disinfecting a surface which may be packaged in suitable detergent packaging. The Office Action further states that the includes "a manually operated foam trigger-type dispensers" as discussed in Col. 6, lines 23-44.

Applicants submit that Petri in Col. 16, lines 23-44 states:

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Packaging Form of the Microemulsions

The microemulsions herein may be packaged in a variety
25 of suitable detergent packaging known to those skilled in the
art. The microemulsions herein may desirably be packaged
in manually operated spray dispensing containers, which are
usually made of synthetic organic polymeric plastic mate-
rials. Accordingly, the present invention also encompasses
30 microemulsions as described herein before packaged in a
spray dispenser, preferably in a trigger spray dispenser or in
a pump spray dispenser.

For example, said spray-type dispensers allow to uni-
formly apply to a relatively large area of a surface to be
disinfected, the microemulsions of the present invention,
35 thereby contributing to disinfecting properties of said micro-
emulsions. Such spray-type dispensers are particularly suit-
able to treat vertical surfaces.

Suitable spray-type dispensers to be used according to the
present invention include manually operated foam trigger-
40 type dispensers sold for example by Specialty Packaging
Products, Inc. or Continental Sprayers, Inc. These types of
dispensers are disclosed, for instance, in U.S. Pat. No.
4,701,311 to Dunnining et al. and U.S. Pat. No. 4,646,973
and U.S. Pat. No. 4,538,745 both to Focarracci. Particularly

Applicants submit that upon closer examination, the "foam trigger-type dispensers" in Petri et al. are disclosed in US 4,781,311, US 4,646,973 and US 4,538,745. None of which relate to a foam-generating dispenser includes a gas imparting mechanism to form the foam from air via an air injection piston, foam-generating aperture, an impinging surface, a mesh or net, a pump, and a sprayer.

US 4,781,311 discusses a trigger sprayer having the following structure:

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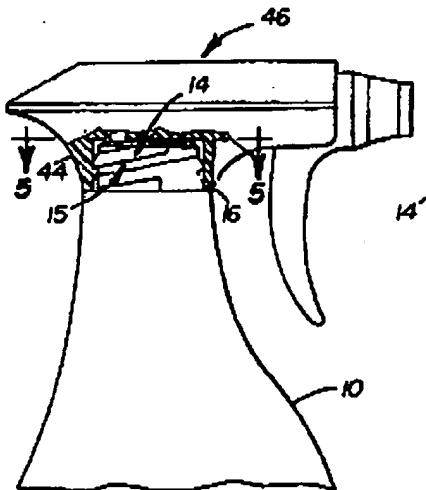


FIGURE 1

For completeness, Applicants have reproduced the summary of US 4,781,311 below for all of the preferred and non-preferred embodiments discussed therein.

SUMMARY AND DISCLOSURE OF THE INVENTION

One aspect of the invention is a cap closure that incorporates a snap-on, snap-off, twist-on, twist-off opening and closing mechanism and also provides accurate alignment of the cap closure with respect to the container.

A second aspect of the invention is to provide a novel cap closure configuration which has a minimum of parts while still performing the same functions and is therefore less costly to produce.

A third aspect of the invention is to provide a refillable container and closure which is particularly suited for dispensing liquids by means of a trigger spray mechanism.

Another aspect of the invention is a container cap closure which may be accurately aligned with the neck of the container and, depending on the neck molding, is either removable or irremovable from the container.

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These aspects are accomplished by a unique cap closure and varied neck configurations comprising a container with a neck having an inner bore and either external threads or an external annular bead fastener, and vertical stops or walls. A cap closure having an outer annular skirt having inwardly projecting lugs adapted to pass over the threads or bead fastener with axial pressure and to abut the walls upon closure while an annular inner skirt seals the inner bore is provided.

The cap material may be rigid or resilient, but the lugs must be so designed as to spring past the threads or bead fastener when the cap is applied to the neck using axial pressure. When the lugs and cap are made from a rigid material, the material for the threads or bead fastener must be yieldable.

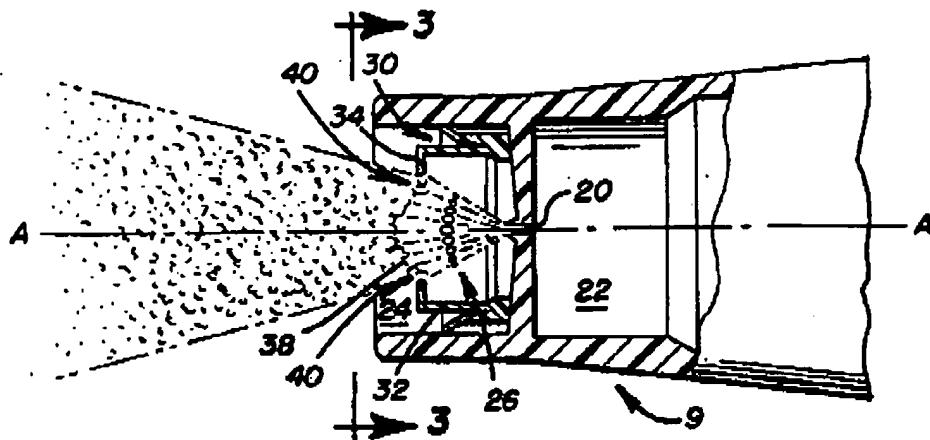
The cap closure can be snapped on and off and twisted on and off when the fastening means are external threads and the walls are located diametrically opposite each other so that they abut the lugs in opposite directions relative to the neck. Upon closure, the top side of each lug interfaces with the under surface of the external threads. Depending on the extent of the interfacing (i.e. not more than 2/3 of the width of each lug's top side), the cap may also be snapped off.

In a second embodiment the fastening means is an annular bead and the interface or engagement between the bead and the lugs is substantially the width of the lugs' top sides and the walls on the neck abut the lugs in the same direction relative to the neck, the cap closure is irremovable and unyieldingly aligned. In yet another embodiment similar to the first embodiment an additional pair of oppositely facing lugs are provided intermediate the inwardly projecting lugs as will be more fully described hereinafter.

Applicants note that the word "foam" is absent from the specification of US 4,781,311 and therefore Applicants believe that reliance on US 4,781,311 for teaching or suggesting a foam-generating dispenser of the present applicant is misplaced.

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US 4,646,973 discusses an impingement foamer having the following structure:



For completeness, Applicants have reproduced the summary of US 4,646,973 below for all of the preferred and non-preferred embodiments discussed therein.

SUMMARY OF OBJECTS OF THE INVENTION

The instant foam producing process and apparatus comprises a precision flow interrupter placed in a stream of a continuous flow high pressure atomized liquid. The interrupter acts upon only the outer peripheral portion of the atomized spray stream or cone, treating only the smallest liquid particulate therein. The small particles, upon impingement with the interrupter, reverse direction and impinge upon and agglomerate with larger sized particulate in the main body of the atomized spray. The turbulence created by reversal of the flow direction of the smaller particulate causes a pressure drop which draws in ambient air from downstream of the flow interrupter. The incoming ambient air, in a direction opposite to the main flow of the atomized stream, slows the velocity of the stream while causing aeration of the larger particulate suspension with consequent production of dense, adherent foam moving at low velocity.

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The primary object of the present invention is to provide an apparatus and process for quickly, efficiently, and economically creating a large-particulate, viscous foam.

Another object of the present invention is to provide an apparatus having means for impinging upon and interrupting the flow of only relatively small particulate portions of an atomized spray to cause the agglomeration of said small particles into larger particles.

A further object of the present invention is to provide a foam producing apparatus and process which interrupts the peripheral flow of an atomized liquid stream to produce turbulence with consequent low pressure production and induction of ambient air to the stream.

An additional object of the present invention is to provide an apparatus which causes turbulence in a peripheral portion of an atomized stream and causes induction of ambient air from a location downstream of the apparatus.

Another object of the present invention is to provide an apparatus for producing foam having a low level of small particulate to reduce vapor phase user irritation and olfactory sensation.

A further object of the present invention is to provide a foam-producing continuous flow spray apparatus which produces a viscous, low velocity foam which does not "bounce back" but rather adheres to a target surface and does not "run" or "drip" from the target area or from the spraying apparatus.

Other objects and advantages of the present invention will become apparent from the following drawing and description.

The accompanying drawing shows, by way of illustration only, the preferred embodiment of the present invention and the principles thereof. It should be recognized that other embodiments of the invention, applying

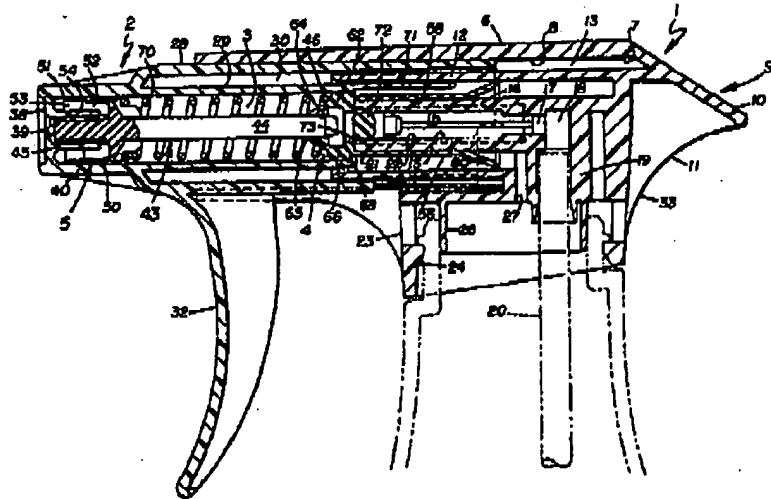
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the same or equivalent principles, may be used and that structural changes may be made as desired by those skilled in the art without departing from the spirit of the invention.

Where the orifice (38) created by perforation of the face (34) interrupts the liquid flow cone issuing from the atomizer orifice (20). US 4,646,973 further states that there is a critical relationship between the size of the spray cone formed by the atomizer orifice and the size of the interrupter orifice. (Col. 2, lines 47-54). The mixture of fluid in the chamber 26 is emitted from the orifice 38 as large sized particulate, highly aerated low velocity foam. The fluid is delivered through the atomizer orifice from a pressurized receptacle (not shown). (Col. 1, lines 51-62).

Applicants submit that the word “foam” is used in the description of US 4,646,973. However, the physical structure of how foam is produced, as one skilled in the art would understand it, does not teach or suggest the claimed structure of the Applicants’ claimed invention of the present application. As such, reliance upon US 4,646,973 via the reliance on Petri, is also misplaced and the rejection should be removed.

US 4,538,745 discusses a trigger sprayer having the following structure:



For completeness, Applicants have reproduced the summary of US 4,538,745 below for all of the preferred and non-preferred embodiments discussed therein.

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SUMMARY OF THE INVENTION

The trigger sprayer of the present invention includes a housing and an actuator reciprocally slidable within the housing, wherein the housing and actuator provide a pump chamber, inlet and outlet passages in said housing and actuator for communicating fluid to and from the pump chamber, and inlet and outlet valves for controlling flow of fluid in the inlet and outlet passages. The valves include an axial rod member having a frustoconical skirt providing one of the valves and a distal end providing a slidable valve seat for the other of the valves. A flexible tubular member includes a frustoconical portion arranged to cooperate with the distal end of the rod to provide said other valve.

The present invention also provides a shipping seal disposed within a passage leading to the sprayer pump chamber for sealing thereof and which is arranged to be displaced from said sealing location upon actuation of the sprayer by the rod member, to allow fluid to flow through the passage. The seal is provided as an integral portion of the flexible tubular member.

The present invention also provides a vent passage valve for control of air flow through the sprayer into a container to which it is coupled. The vent passage valve is provided by another portion of the flexible tubular member.

Applicants note that the word "foam" is absent from the specification of US 4,538,745 and therefore Applicants believe that reliance on US 4,538,745 for teaching or suggesting a foam-generating dispenser of the present application is misplaced.

Fowler et al. discusses a nonaerosol dispenser having three meshes. Applicants question why one of skill in the art would make the proposed modification to Loth or Petri et al. as set forth in Col. 16, lines 23-44 which (1) does not refer to a dispenser that generates foam (see US 4,781,311 and US 4,538,745) or (2) discusses a specific structure in a spray nozzle to generate a foam from a cleaning composition (see US 4,646,973) would be combined by in view of Fowler et al. to add three meshes?

A statement that modifications of the prior art to meet the claimed invention would have been "well within the ordinary skill of the art at the time the claimed invention was

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made" because the references relied upon teach that all aspects of the claimed invention were individually known in the art is not sufficient to establish a *prima facie* case of obviousness without some objective reason to combine the teachings of the references. *Ex parte Levengood*, 28 USPQ2d 1300 (Bd. Pat. App. & Inter. 1993) [emphasis in original].

As such, Applicants request that the rejection under 35 U.S.C. § 103(a) be withdrawn.

Rejection Under 35 USC §103(a) Over US 5,075,026 (Loth) in view of US 5,635,469
(Fowler et al.)

Claim 3 is rejected under 35 U.S.C. § 103(a) over Loth in view of Fowler et al..

Applicants note that a bulk of their previous arguments have not been addressed by the Office Action regarding the impropriety of using Loth as a reference under §103 if the pump-type sprayer if Loth is not sufficiently described so as to determine the structure or function of the sprayer. The Office Action merely states that the pump-type sprayers in the Ortiz Declaration, " * * * are identified or specifically disclosed in Loth to make a meaningful side-by-side comparison." This is entirely Applicants point – Loth itself does not say more than "pump-type sprayer" and Applicants have submitted Dr. Ortiz's Declaration – as one skilled in the art – as to the meaning of "pump-type sprayer". The Office Action has not addressed the Ortiz Declaration in any way other than with unsupported conclusory statements.

As such, Applicants have re-stated previously submitted arguments/discussion to the previously submitted rejections submitted in the February 20, 2007, office action that were reproduced essentially verbatim in the September 18, 2007, Office Action.

Applicants submit and discuss above that Loth does not establish a *prima facie* case of obviousness because it does not teach or suggest all of the claim limitations of Claim 3 alone or in view of Fowler et al.. Applicants also refer to the discussion above regarding Fowler et al..

As such, Applicants submit that a *prima facie* case with respect to all of the claim limitations of Claim 3 has not been established and that the rejection under 35 U.S.C. §103(a) should be withdrawn.

Rejection Under 35 USC §103(a) Over US 5,075,026 (Loth) in view of US

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5,679,630 (Baeck et al.)

Claim 5 is rejected under 35 U.S.C. §103(a) over Loth in view of Baeck et al.

Applicants note that a bulk of their previous arguments have not been addressed by the Office Action regarding the impropriety of using Loth as a reference under §103 if the pump-type sprayer if Loth is not sufficiently described so as to determine the structure or function of the sprayer. The Office Action merely states that the pump-type sprayers in the Ortiz Declaration, “* * * are identified or specifically disclosed in Loth to make a meaningful side-by-side comparison.” This is entirely Applicants point – Loth itself does not say more than “pump-type sprayer” and Applicants have submitted Dr. Ortiz’s Declaration – as one skilled in the art – as to the meaning of “pump-type sprayer”. The Office Action has not addressed the Ortiz Declaration in any way other than with unsupported conclusory statements.

As such, Applicants have re-stated previously submitted arguments/discussion to the previously submitted rejections submitted in the February 20, 2007, office action that were reproduced essentially verbatim in the September 18, 2007, Office Action.

Applicants submit and discuss above that Loth in view of Baeck et al. does not establish a prima facie case of obviousness because it does not teach or suggest all of the claim limitations of Claim 5. The Office Action does not cite Baeck et al. with respect to a foam-generating dispenser, rather it is cited as teaching protease enzymes having improved proteolytic activity which can be used in any detergent composition or concentrated detergent compositions where high sudsing and/or good insoluble substrate removal are desired.. As such, Applicants submit that a prima facie case with respect to all of the claim limitations of claim from with Claim 5 depends, likewise does not present a prima facie case with respect to all of the claim limitations of Claim 5 and that the rejection under 35 U.S.C. §103(a) should be withdrawn.

Rejection Under 35 USC §103(a) Over US 5,075,026 (Loth) in view of US 3,422,993 (Boehm et al.)

Claim 9 is rejected under 35 U.S.C. §103(a) over Loth in view of Boehm et al. and Loth in view of Petri et al. further in view of Boehm et al..

Claim 9 has been cancelled in view of the amendment to Claim 1.

Rejection Under 35 USC §103(a) Over US 6,114,298 (Petri et al.) and further

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view of US 3,422,993 (Boehm et al.)

Claim 9 is rejected under 35 U.S.C. §103(a) over Petri et al. in view of Boehm et al..

Claim 9 has been cancelled in view of the amendment to Claim 1.

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Conclusion

In light of the above remarks, it is requested that the Examiner reconsider and withdraw the rejection under 35 U.S.C. § 103(a). Early and favorable action in the case is respectfully requested. Applicants' attorney invites the Examiner to contact her with any questions the Examiner may have regarding this application.

This response represents an earnest effort to place the application in proper form and to distinguish the invention as now claimed from the applied references. In view of the foregoing, reconsideration of this application, entry of the amendments presented herein, and allowance of Claims 1-9 and 11-15 is respectfully requested.

Respectfully submitted,

THE PROCTER & GAMBLE COMPANY

By _____

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Date: May 30, 2008
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